(4)

No. 91-946

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
HILLARY RICHARD
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway–Fifth Floor
New York, New York 10003-9518
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway–Fifth Floor
New York, New York 10003
(212) 982-9870

Attorneys for Petitioner Church of Scientology of California

Dated: May 1, 1992

QUESTION PRESENTED

Whether the decision of the Court of Appeals -- which conflicts with decisions of this Court and of other courts of appeals -- was in error in dismissing petitioner's appeal as moot following compliance by a disinterested third party with an IRS summons enforcement order, although effectual relief remains available to the petitioner through return of documents and prohibition on the government's future use of the documents?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
United States of America
Frank S. Zolin

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the court of appeals dismissing the appeal as moot (Pet. App. 1a-2a)[1/] is unreported. The March 13, April 15, and May 21, 1991, orders of the district court (Pet. App. 3a-11a) are unreported. A prior opinion and order of the court of appeals (Pet. App. 13a-15a), reported at 905 F.2d 1344 (9th Cir. 1990), *cert. denied*, ___U.S.___, 111 S.Ct. 1309 (1991), and the unreported order of the court of appeals denying rehearing and a suggestion for rehear-

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1/ "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari, filed on December 9, 1991.

ing *en banc* (Pet. App. 12a), followed the remand from this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989). The order of the *en banc* court of appeals, issued prior to this Court's decision, vacating the order granting rehearing (Pet. App. 18a-26a) is reported at 842 F.2d 1135. A subsequent concurrence to that order (Pet. App. 16a-17a) is reported at 850 F.2d 610. The earlier order of the *en banc* court of appeals granting rehearing (Pet. App. 27a) is reported at 832 F.2d 127. The initial opinion of the court of appeals panel (Pet. App. 28a-41a) is reported at 809 F.2d 1411. The April 30, 1985, order of the district court (Pet. App. 44a-46a), and the June 10, 1985, order of the district court denying reconsideration (Pet. App. 42a-43a) are unreported.

JURISDICTION

The final judgment of the court of appeals was entered on September 10, 1991 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 9, 1991, and was granted on March 2, 1992 (112 S.Ct. 1261). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies to which the United States shall be a Party. . . ."

STATEMENT OF THE CASE

1. The MCCS tapes, which are the subject of this litigation, involve two confidential attorney-client conversations held in July 1980 between lawyers and representatives of the Church of Scientology of California ("the Church") and L. Ron Hubbard. The tapes were wrongfully obtained by Gerald Armstrong,

a former adherent of the Scientology religion, in the early 1980's. *See Zolin*, *supra*, 491 U.S. at 557. The tapes, along with thousands of other documents that had been in the custody of the Church either as owner of the property or as bailee for Mr. Hubbard, and which were wrongfully obtained by Armstrong, were eventually ordered placed under seal in the custody of the Los Angeles County Superior Court in *Church of Scientology of California* v. *Armstrong* (No. C420153). *See Zolin*, 491 U.S. at 557. On October 24, 1984, the IRS served the subject summons on the Los Angeles County Clerk, who also serves as the Clerk of the Los Angeles County Superior Court, which summons sought production of numerous exhibits held under seal in the pending *Armstrong* case. *See id.* On November 21, 1984, the County Clerk complied with the IRS summons despite extant sealing orders, and made the tapes, as well as other sealed documents, available to the IRS, which made copies, reviewed, and took notes of the tapes. *See id.*; Pet. App. 48a; E.R. 2-4.[2/]

On November 27, 1984, the district court, in *Church of Scientology* v. *Armstrong*, No. CV 84-9003-HLH (C.D.Cal.), ordered the IRS to place the copies of the tapes and any notes made from them, as well as the other sealed documents, in the custody of the district court, because the County Clerk had erroneously made the sealed tapes available to the IRS (Pet. App. 47a-49a); *Zolin*, 491 U.S. at 557-58; E.R. 15-17. The government did not argue at that time that the County Clerk's compliance with the summons made the Church's proceeding for the return of the tapes moot. The IRS complied with the district court's order on or about November 29, 1984 (Pet. App. 48a); E.R. 4. The original tapes remained under seal in the custody

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[2/] "E.R." refers to Appellant's Excerpts of Record filed by the Church in the court below.

of the Superior Court, and on January 22, 1985, the district court ordered that the copies and notes also be returned to the Superior Court's custody (Pet. App. 47a-49a).

2. On January 18, 1985, the government commenced this proceeding, pursuant to 26 U.S.C. §§ 7402, 7602 and 7604, by filing a petition in the district court to enforce the summons served upon the Los Angeles County Clerk (Pet. App. 29a); *Zolin*, 491 U.S. at 558; E.R. 1-22. The Church, asserting its own privacy and proprietary interests as owner of the documents, its interests as bailee for the interests and rights of Mr. Hubbard, and as attorney-client privilege-holder, intervened in the district court, pursuant to 26 U.S.C. § 7609, to oppose enforcement of the summons on various grounds, including that the MCCS tapes are protected by the attorney-client privilege (Pet. App. 29a); E.R. 70, item 7. The government stated that it did not oppose the motion to intervene, which was granted on February 20, 1985. E.R. 70, item 11.

The government asserted that the crime-fraud exception to the privilege applied to the MCCS tapes. A key issue in this litigation has been whether a transcript of the tapes obtained by the IRS could be considered in determining the crime-fraud question, and if so, whether the exception was established. As one element of this issue, the Church attempted to raise the question whether the government had obtained the partial transcript unlawfully through violation of the Superior Court sealing orders. The district court, however, precluded the Church from presenting evidence on this issue, finding it irrelevant. E.R. 26-34. The court then ruled in the Church's favor on the merits of the crime-fraud issue *after* reviewing the transcript (Pet. App. 45a). Whether the transcript could be reviewed and whether the crime-fraud exception applied to the tapes was extensively litigated in

the district court (Pet. App. 42a-46a), in the court of appeals (Pet. App. 16a-41a), and in this Court, *Zolin*, 491 U.S. 554.

In *Zolin*, this Court held:

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Id. at 572 (internal quotations and citations omitted). This Court further held that "the threshold showing to obtain *in camera* review may be met by using any relevant evidence, *lawfully obtained*, that has not been adjudicated to be privileged." *Id.* at 575 (emphasis added). This Court noted that whether the government had lawfully obtained the partial transcript was unresolved. *Id.* at 559 n.5.

3. On remand from this Court, the court of appeals reviewed the transcript and stated that it "appear[ed] to" establish the crime-fraud exception (Pet. App. 15a). The court then stated, "On remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time." (Pet. App. 15a).[3/] In a footnote to this statement, the court of appeals specifically noted that *it* had not reached the issue whether the transcript was lawfully obtained because "[t]he Church did not raise this issue in its original appeal" (Pet. App. 15a n.2) (emphasis added). The court of appeals

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3/ There is in fact no proceeding into which the tapes may be admitted.

appeared to be confused about the procedural posture of the case, as the Church had prevailed on the tapes issue in the district court; the government had appealed the decision, *not* the Church. In any event, the court of appeal's decision did not preclude the district court from resolving an issue that the Church had raised, but which the district court had refused to address, erroneously believing it to be irrelevant, and which had been unnecessary to the district court's original decision.

The Church's petition for rehearing and suggestion for rehearing *en banc* was denied on September 19, 1990 (Pet. App. 12a). Its petition for a writ of certiorari was denied on March 18, 1991. *Church of Scientology of California* v. *United States*, ___U.S. ___, 111 S.Ct. 1309 (1991).

4. On January 14, 1991, while the Church's petition for a writ of certiorari was *sub judice* in this Court, the government, without notice to the Church, moved in the district court for access to the MCCS tapes. E.R. 74, item 58. On January 17, again without notice to the Church, the district court ordered that the tapes in the possession of the Superior Court be made available for inspection and copying by the government. E.R. 40-41. On January 23, 1991, the government obtained an *ex parte* order from the Superior Court, which ordered the County Clerk to comply with the district court's enforcement order. E.R. 42-43. That same day, the County Clerk made the tapes available to the government, which then made copies of the tapes.

The Church did not learn of these *ex parte* proceedings until February 1, 1991. The Church then moved for return of the tapes on the grounds that: 1) the district court's April 30, 1985 stay order remained in effect (Pet. App. 45a-46a); 2) the government had failed to give the Church notice of its attempt to

obtain the tapes on January 14, 1991; and 3) several important issues remained for resolution on remand. On March 13, 1991, the district court ordered that any copies of the tapes and any notes or transcripts in the possession of the government be returned to the district court (Pet. App. 7a-8a, 11a). On March 14, 1991, the government complied with that order. E.R. 75, item 77. Again, the government did not argue that the case was moot because the County Clerk had complied fully with the district court's enforcement order and the government had obtained the tapes.

In the district court, the Church opposed enforcement of the summons on three grounds: (1) the question whether the IRS obtained the transcript in a lawful manner remained to be decided, pursuant to the remand of this Court and the court of appeals; (2) testimony in January 1991 of the relevant IRS agents revealed that the investigation of the IRS' Criminal Investigation Division, pursuant to which the summons for the tapes was issued in October 1984, had been terminated, and that the civil component of the IRS' tax examination had been completed; thus, in the absence of any investigation whatsoever, there remained no legitimate investigatory purpose for the summons, *see United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); 26 U.S.C. § 7602(a); and (3) the district court should review the tapes themselves *in camera* (which no court has ever done) to assure that their release would not violate the attorney-client privilege, consistent with the procedure urged by the three dissenting judges in the court of appeals' *en banc* order vacating the order granting *en banc* review (Pet. App. 24a-26a).

The district court refused to consider any of the Church's arguments on their merits. Instead, in an extremely convoluted analysis, it held that the court of appeals, although concededly not addressing any of

these issues directly, had precluded the district court's consideration of them when it resolved the attorney-client privilege issue (Pet. App. 3a-4a, 8a-11a). Following this Court's denial of the Church's petition for a writ of certiorari on March 18, 1991, the district court, by order dated April 15, 1991, ordered that the tapes be delivered to the IRS (Pet. App. 5a-6a). The district court refused to stay its order pending appeal, but did grant a 21-day stay to permit the Church to seek a stay from the court of appeals (Pet. App. 6a).

5. The Church filed a timely notice of appeal and sought a stay of the district court's order in the court of appeals on April 25, 1991. That court denied the Church's stay application on May 6, 1991, but granted the Church a 7-day stay to permit the Church to seek a stay from this Court. On May 8, 1991, Circuit Justice Sandra Day O'Connor denied the Church's application for a stay.

Following these denials, the Church moved on May 16, 1991, to expedite its appeal. On May 21, before the court acted on this motion, the district court ordered that the government could obtain the copies of the tapes held by the district court (Pet. App. 3a-4a), and soon thereafter the government obtained those copies. On May 24, 1991, the Church filed a renewed emergency motion for a stay seeking same day relief. Emergency relief was denied that day, and the motion was denied on May 30, 1991. On May 31, 1991, the court denied the Church's second renewed emergency motion for a stay pending appeal, filed on that date.

On May 30, 1991, the court of appeals also ordered that the Church show cause why its appeal should not be dismissed as moot on the ground that

the IRS had obtained the tapes.[4/] Following briefing on this issue, on September 10, 1991, the court of appeals dismissed the Church's appeal as moot, holding that, "Because it is undisputed that the tapes have been turned over to the IRS in compliance with the summons enforcement order, no controversy exists presently and this appeal is moot. *See United States* v. *Kersting*, 891 F.2d 1407, 1410 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990)" (Pet. App. 2a). The order contained no further analysis or reasoning. The meritorious issues that the Church raised in the district court and on appeal from the district court's order have never been addressed.

SUMMARY OF ARGUMENT

I. The court of appeals erred in dismissing petitioner's appeal as moot following disinterested third party compliance with a district court order enforcing an IRS summons. The federal courts have long held that an appeal is not moot when adverse parties continue to have a live, concrete legal interest in the outcome of the litigation and the court may grant effectual relief, even if it is not complete and perfect relief or the precise relief requested in the initial proceedings. In this case, such relief is readily available through return of all copies of the tapes and no further use of any information derived from them. Indeed, such relief has been granted twice previously

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4/ On June 11, 1991, the court granted the Church's motion to expedite the appeal. The Church submitted its brief on the merits and Excerpts of Record on July 9, 1991, while the mootness issue was *sub judice*. The government, however, never submitted its brief on the merits, originally due July 30, 1991, as the court did not rule on the government's request for an extension of time to file its brief until it ruled that the appeal was moot (Pet. App. 2a).

in this proceeding, with no claim by the government—that this access to the tapes rendered this case moot.

II. Contrary to the government's unfounded assertion, the Church's claim that this appeal is not moot because of the availability of effective relief is not novel. The Church's position is consistent with several decisions of the Third Circuit involving IRS summons enforcement orders, with closely analogous decisions of this Court and several courts of appeals involving court-ordered government access to documents related to grand jury proceedings, and with court orders enforcing Federal Trade Commission subpoenas. These decisions consistently have recognized that a case is not moot even after disclosure of documents to the government because the federal courts can order no further disclosures, no further use, and return of the documents.

III. Even if this Court were to conclude that compliance with a summons enforcement order by the taxpayer himself or by another interested party would render an appeal by the complying party moot -- because an interested party may choose to refuse to comply and challenge the underlying order in a contempt proceeding -- an appeal by an interested party should not be held moot following compliance with an IRS summons enforcement order by a disinterested third party, as occurred in this case. The Church emphasizes that it is not seeking an equitable exception to the mootness doctrine, but rather that disinterested party compliance does nothing to remove the interested party's adverse concrete interest in the outcome of a litigation for which effective relief may be granted. Several courts in summons enforcement cases have recognized that it is unreasonable to expect a disinterested third party to refuse to comply and to be held in contempt and that the interested party's right to appeal should not turn on the fortuity of the

location of the documents. These cases are consistent both with this Court's decisions recognizing that jurisdictional requirements must be interpreted to protect an interested party's right to appeal when faced with court orders directing disinterested parties to produce documents, and with legislation that provides interested parties with an absolute right to intervene to contest an IRS summons enforcement proceeding directed at a disinterested party.

IV. The government's arguments, like the cases upon which the government relies, fail to address the crucial issue -- the availability of immediate effective relief through prohibiting the use of the documents and requiring their return. Instead, those few cases that contain any analysis of the issue focus on a past event -- disclosure of the documents -- or a speculative future event -- admission of the documents in evidence in a proceeding brought by the IRS. These cases simply ignore the very serious harms that the taxpayer suffers, as recognized by Congress and the decisions discussed in Point II, *infra*, when the IRS has improper or unlawful access to the citizen's private, proprietary papers, and when it uses those papers to conduct a potentially intrusive and embarrassing investigation of a taxpayer, which may lead to a criminal or civil tax prosecution dependent on the improperly obtained documents.

ARGUMENT

I. AN APPEAL IS NOT MOOT WHEN, AS HERE, EFFECTIVE RELIEF IS AVAILABLE TO THE PREVAILING PARTY

As this Court has recently reiterated, "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Determination of whether a particular case is moot has long rested on two interrelated considera-

tions: whether there is an actual live, concrete controversy between the parties and whether the courts may grant any effectual relief to the prevailing party. Analysis of these two issues demonstrates that this case is not moot because the parties are clearly engaged in a live concrete controversy over the propriety of IRS access to and use of the tapes and because effective relief may be granted to the Church should it ultimately prevail, by requiring the IRS to return all copies of the tapes and to make no further use of any information derived from them.

Although this Court has used various formulations, the basic principle that the parties must retain a real, legal interest in the outcome of the controversy has long been settled. For example, in *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979), this Court declared, "'Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 631 (quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)). In *Davis*, the Court found a case had become moot when "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." 440 U.S. at 631 (emphasis added). Using somewhat different language, in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), this Court restated the principle that a case is moot when "[t]he controversy between the parties has . . . ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'" *Id.* at 317 (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937)); *see also Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984) ("As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot. . . ."). This Court has consistently held that "[t]he burden of demonstrating mootness 'is a heavy one.'" *Davis*, 440 U.S. at 631

(quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *see Stotts*, 467 U.S. at 570.

Here, the controversy between the Church and the government over the subject matter of this case -- government access to and use of the MCCS tapes -- remains "definite and concrete," *DeFunis*, 416 U.S. at 317, and the parties continue to have "adverse legal interests," *id.*, and "a legally cognizable interest in the outcome," *Davis*, 440 U.S. at 631. The Church, for its part, continues to maintain that the IRS has no right to possess or use its tapes to pursue an alleged civil tax fraud investigation and it seeks to prevent continued IRS possession and use of its tapes. The government, on the other hand, asserts a continuing interest in possessing and using the tapes in furtherance of an alleged investigation of the targets of the initial summons.[5/] Thus, the parties are as "adverse" now as they were at the initiation of this litigation, and the dispute remains as "definite and concrete" as ever. And, as shown in Points II and III, *infra*, the parties retain "a concrete interest in the outcome of the litigation." *Stotts*, 467 U.S. at 571. The government has utterly failed to meet its "heavy burden" of demon-

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[5/] Whether the IRS in fact wholly abandoned and terminated the investigation upon which the summons was based *prior* to obtaining the tapes in May 1991 is a question raised by the Church in the district court and the court of appeals, which has never been addressed on the merits. The government does not appear to contend that there is an actual ongoing investigation to which the tapes remain relevant, but rather that "[t]he IRS has the *power* to conduct an investigation for fraud at anytime." Government Brief in Opposition at 14 n.9 (emphasis added). Whether this is a sufficient basis to establish a legitimate investigatory purpose for enforcement of an IRS summons, pursuant to *Powell*, *supra*, should be addressed on the merits by the lower courts.

strating that this case is moot, and nothing in the opinion of the court below even purports to explain why there is no longer a "live" controversy between the parties.

The second, interrelated mootness inquiry is the availability of effective relief. Indeed, "[t]he central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief . . . courts must be careful to appraise the full range of remedial opportunities." 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.3, at 261 (2d ed. 1984).

In determining whether interim events have rendered an appeal moot, the federal courts historically have refused to limit their consideration to whether the precise relief that the parties originally sought is still available. Rather, the courts determine whether an event has occurred "which renders it *impossible* for this court . . . to grant [a party] *any effectual relief whatever.*" *Mills* v. *Green*, 159 U.S. 651, 653 (1895) (emphasis added). The courts of appeals continue to cite *Mills* for this basic principle. *See, e.g., In re Stadium Management Corp.*, 895 F.2d 845, 848 (1st Cir. 1990); *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 841 F.2d 92, 95-96 (4th Cir. 1988); *Garcia* v. *Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986); *Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103, 1108 (3d Cir. 1985), *cert denied*, 475 U.S. 1013 (1986); *In re De Lorean Motor Co.*, 755 F.2d 1223, 1226 (6th Cir. 1985); *see also Rustad* v. *United States Air Force*, 718 F.2d 348, 350 (10th Cir. 1983) (case is not moot although "immediate relief sought . . . is no longer possible . . . . [T]hat is not necessarily the only relief which could be fashioned by this Court should Rustad prevail on the merits"); *Pyramid Lake Paiute Tribe* v. *Hodel*, 882 F.2d 364, 368 (9th Cir. 1989). Simply stated, "decision should not be denied if a worthwhile remedy can be given," 13A Wright, Miller, & Cooper, *supra*, § 3533.3, at 278; *i.e.*, a case is not moot when the court has the "ability to undo the effects of conduct that was not prevented by the time of decision," *id.* at 279 & n.36 (citing cases).

This well-settled doctrine that mootness does not turn on the availability on appeal of the precise relief originally requested is reflected in decisions interpreting Fed. R. Civ. P. 54(c), which flexibly provides in pertinent part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief* in the party's pleadings" (emphasis added). As one court has stated in rejecting an argument that an appeal was moot because the originally requested relief was no longer available, "The rule [54(c)] requires that a court ascertain whether the plaintiffs are entitled to *any* remedy, not whether they have asked for the proper remedy." *Kirby* v. *United States Government*, 745 F.2d 204, 207 (3d Cir. 1984) (emphasis original); *see also Detroit, Toledo & R. Co.* v. *Consolidated Rail Corp.*, 767 F.2d 274, 279 (6th Cir. 1985).

On this appeal, the Church has contended that, should it ultimately prevail on the merits, it is entitled, at the very least, to return of all copies of its tapes to the custody of the state Superior Court, and to have the IRS make no further use of information derived from its tapes. If such relief were granted, it would constitute "effectual relief" and would essentially, if not perfectly, restore the parties to the *status quo ante*.

Indeed, *twice* previously in this very case, the IRS obtained access to the tapes following erroneous court orders, and both times the district court ordered the tapes and any notes or copies of them returned to

the custody and control of the district court (Pet. App. 8a, 47a-49a); *Zolin*, 491 U.S. at 557-58. At no time did the government, the lower courts, or this Court suggest that this court-authorized IRS access made the case moot or that return of the tapes did not constitute "effectual relief" merely because one could hypothesize that the *status quo ante* was not perfectly restored. In fact, so "effectual" was the relief afforded by the two earlier orders that the government continued to press its claim for renewed access to the tapes, and the Church continued to resist that claim.

Now the government contends that "a decision reversing an enforcement order could not alter the fact that the records have been produced and could not erase the knowledge obtained from those records." Opp. at 8. This contention ignores the long-settled doctrine that the issue is the availability of "any effectual relief," not precise restoration of the *status quo ante*. *See, e.g., Cardwell* v. *Kurtz*, 765 F.2d 776, 779 (9th Cir. 1985) (although court cannot "purg[e] the memories of government agents, [that] would not justify a refusal to grant as much relief as possible"). It further conveniently ignores the fact that the same could have been said on the two previous occasions when the government obtained the tapes. The government has failed to present any principled reason why such relief, effective twice previously to restore the *status quo* in this very case, would not constitute effectual relief now.

II. NUMEROUS COURTS HAVE HELD THAT GOVERNMENT ACCESS TO DOCUMENTS DOES NOT RENDER AN APPEAL MOOT

In IRS summons enforcement cases and in closely analogous situations involving government subpoenas or other government efforts to obtain documents, numerous courts, including this Court, have held that an appeal from a court order granting the

government access to documents does not become moot once the government obtains the documents, because the court can order the government to return the documents or to make no further use of them. These cases recognize that government access does not end the controversy; the parties retain adverse legal interests in the outcome because effective relief remains available to the government's target. As there is no reason why like relief cannot be ordered in this case should the Church ultimately prevail on the merits of its appeal, this case is not moot.

In *Gluck* v. *United States*, 771 F.2d 750 (3d Cir. 1985), for example, the Third Circuit held that full compliance by a bank with an order enforcing an IRS summons did not moot the appeal by the Glucks, the intervening taxpayers. The court reasoned that "the surrendering of the documents [by the bank] to the IRS does not end the controversy *between the parties* because, if we find that the summonses were illegal, we can still fashion a remedy -- *prohibition of the use of the summoned documents* -- to afford the Glucks effective relief." *Id.* at 754 (emphasis added). The court distinguished the situation in *Gluck* from a case such as *Vesco* v. *SEC*, 462 F.2d 1350, 1351 (3d Cir. 1972), in which the very act of disclosing the documents to the government gave rise to irreversible, irremediable harm to Vesco -- possible criminal liability under Swiss bank secrecy law for the act of disclosing the documents to the SEC -- which the federal courts had no power to cure. *See Gluck*, 771 F.2d at 754. Similarly, in *United States* v. *Waltman*, 525 F.2d 371 (3d Cir. 1975), another IRS summons enforcement matter, the court stated, "Because a stay was denied, the diary was produced. However, the case is not moot since if the diary is not a corporate record, the individual respondent is entitled to its return and appropriate suppression *of the use* of its contents." *Id.* at 373 n.1; *see also United States* v. *Friedman*, 532

F.2d 928, 931 (3d Cir. 1976) (compliance by third parties with IRS summons enforcement order does not moot taxpayer-intervenor's appeal because the court can prevent further use of the records; "the controversy between the IRS and the taxpayers over these records is still very much alive.").[6/]

In a somewhat different context involving the IRS, in *Cardwell* v. *Kurtz*, *supra*, the appellants claimed that the IRS had illegally taken business information during an audit and had incorporated the information in audit reports. 765 F.2d at 779. "Part of the relief requested by the plaintiffs is that the government simply give back what it took illegally." *Id.* The Ninth Circuit held the appeal was not moot because "the district court's inability to effect complete relief, which would include purging the memories of government agents, would not justify a refusal to grant as much relief as possible -- ordering the government to divest itself of the embodiment of the illegally seized information that could be used to refresh those memories." *Id.*

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) ("Sells"), in a situation very similar to the instant controversy, this Court held that an appeal involving access to and use of grand jury documents was not moot because of the availability of effectual relief. In *Sells*, the government sought and obtained a district court order that permitted the disclosure of grand jury materials to attorneys in the Civil Division of the Justice Department. Sells had sought to

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6/ The Church acknowledges that the Third Circuit view represents a minority position in IRS summons enforcement matters. *See* Point IV, *infra*. Nevertheless, the Third Circuit has correctly applied basic mootness principles and its position is consistent with numerous decisions in analogous contexts as set forth, *infra*.

prevent such disclosure. After the district court and the court of appeals refused to stay disclosure pending Sells' appeal,

> the Civil Division attorneys and their assistants enjoyed access to the grand jury materials for more than two years while this case was pending in the Court of Appeals. . . . The Government argued in the Court of Appeals that the case was moot because the disclosure sought to be prevented had already occurred.

Id. at 422 n.6. Despite this disclosure two years earlier, however, this Court held:

> The Court of Appeals correctly rejected the contention:
>
> "The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant *partial relief by preventing further disclosure*." *In re Grand Jury Investigation No. 78-184* (*Sells, Inc.*), 642 F.2d [1184,] 1187-1188 [(9th Cir. 1981)].

463 U.S. at 422-23 n.6 (emphasis added). The court of appeals had also ordered the district court to "take such steps as are . . . necessary to protect the appellants from the effects of past disclosure." 642 F.2d at 1192.

Applying the principles of *Sells* and *Mills* to this case, it is clear that "[t]he controversy here is still a live one," *id.* at 422 n.6, because it is obviously *not* "impossible for this court . . . to grant [a party] any effectual relief whatever." *Mills*, 159 U.S. at 653. As in *Sells*, the issue here is whether the district court erroneously ordered documents turned over to certain government officials and, if so, what shall be the remedy. The simple truth is that there is no relevant distinction between *Sells* and this case on the mootness issue, including the availability of effective relief.[7/] An order preventing further disclosure or use of the tapes and requiring their return would effectively return the parties to the *status quo ante*. While such relief is not "the precise relief sought" in the district court, *Pyramid Lake*, 882 F.2d at 368, it certainly is "effectual relief," *Mills*, 159 U.S. at 653, and "partial relief," *Sells Engineering*, 463 U.S. at 423 n.6, to which the Church would be entitled, should it prevail on the merits. *See id.*

7/ The government has claimed incorrectly that the appeal in *Sells* involved "allegations of impropriety in the [government's] disclosure of grand jury materials" and improper future violations of grand jury secrecy. Opp. at 10-11. In fact, however, the government sought and obtained a district court order that grand jury materials could be disclosed to Civil Division attorneys before any disclosures took place. 463 U.S. at 421-22. There was no issue on appeal from that order that the disclosures violated the terms of the district court's order, or that government officials had engaged in improprieties, but rather that the court's order was in error in permitting Civil Division attorneys to obtain the documents. *Id.* at 422. The government's resort to the fiction that *Sells* involved a challenge to government improprieties, rather than an appeal of an erroneous district court order, only emphasizes that *Sells* directly controls resolution of the mootness issue in the instant matter.

The courts of appeals have also recognized that their ability to order the return of documents obtained through grand jury subpoenas prevents post-compliance appeals from being moot. In *In re Grand Jury Subpoena Dated June 5, 1985* (*Doe*), 825 F.2d 231 (9th Cir. 1987), for example, attorney Doe moved to quash a grand jury subpoena issued to him, which concerned possible criminal activities by both Doe and his client Roe. Doe then delivered attorney-client documents to the court for its *in camera* review in determining the motion. The court then denied the motion to quash and delivered the documents to the government, which presented them to the grand jury, which indicted the client Roe, but not Doe. The Ninth Circuit, relying on both its and this Court's decisions in *Sells*, *supra*, held:

> The grand jury has not indicted Doe; the continued possession and control of the documents by the grand jury places Doe at risk of being indicted. *Cf. Sells*, 642 F.2d at 1187-88. . . . we can diminish this risk *by ordering the return of all of the documents*. *Sells*, 463 U.S. at 422 n.6 . . . . Under our reasoning in *Sells*, Doe's appeal is not moot.

825 F.2d at 235. The court in *Doe* distinguished Roe's appeal, holding that Roe's appeal was moot because Roe "has been indicted; we cannot unring that bell." *Id.* at 234 (internal quotations omitted).

In the instant matter, the IRS has not moved to bring any indictments or civil proceedings based on this summons. The government itself contends, however, that it intends to use the tapes to determine whether to initiate a possible civil prosecution for fraud. Opp. at 14 n.9. This appeal, therefore, is no more moot

than was Doe's.[8/] The targets here are in precisely the same position as Doe, who was permitted to pursue his appeal in the court of appeals even after the government had obtained and made use of the documents. *See also United States* v. *Fischbach and Moore, Inc.*, 776 F.2d 839, 841 n.2 (9th Cir. 1985) (disclosure of grand jury transcripts to civil litigants "does not render this appeal moot. . . . because of harm caused by continuing disclosure") (citing *Sells*, 463 U.S. at 422 n.6)); *cf. In re Federal Grand Jury Investigation* (*McElroy*), 718 F.2d 875, 876 (8th Cir. 1983) (appeal of order authorizing disclosure of federal grand jury transcript to state prosecutor held moot where transcript had been disclosed, state prosecutor had completed his review, had returned the transcript to the custody of the district court, had retained no copies, had instituted no criminal proceedings, and the government had represented it would make no further disclosures absent a new court order).

The courts of appeals have also consistently held that appeals from court orders enforcing Federal Trade Commission subpoenas are not rendered moot after the government has obtained the subpoenaed documents, due to the availability of "effectual relief" through return of the documents or preventing further disclo-

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8/ The court in *Doe* ultimately held that it had no jurisdiction over Doe's appeal because the denial of the motion to quash was not an appealable order, 825 F.2d at 235-36, and that Doe, who was a target of the grand jury, could have refused to comply and challenged the denial in a contempt proceeding. 825 F.2d at 235-36. The court noted, however, that had Doe been "a third-party attorney who cannot be expected to risk a contempt citation," then the "*target of the subpoena*" could appeal the denial of the motion to quash. *Id.* at 236-37 (emphasis original). This important distinction between post-compliance appeals by interested parties and by disinterested third parties is discussed in Point III, *infra*.

sures or use by government officials. In *Casey* v. *FTC*, 578 F.2d 793 (9th Cir. 1978), for example, the court held that despite full compliance with an FTC subpoena *duces tecum*, "[t]he possibility that we may yet afford the Union relief by *preventing further disclosure* or by requiring the FTC *to return records* wrongfully subpoenaed vests the appeal with controversy sufficient to render the case justiciable." *Id.* at 796 (emphasis added). Similarly, in *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900 (5th Cir. 1978), the court held that an appeal of an order enforcing an FTC subpoena *duces tecum* was not moot despite compliance: "[i]f this case were decided in Gibson's favor, relief would be available by an order requiring the FTC *to return the subpoenaed documents* and *to forbid use* of the material in the adjudicatory hearing." *Id.* at 903 (emphasis added); *see also FTC* v. *Ernstthal*, 607 F.2d 488, 489 (D.C. Cir. 1979) (post-compliance appeal of order enforcing FTC subpoenas held not moot: "were appellants to succeed in quashing the FTC's subpoena . . . they would be entitled to the immediate return of the documents); *FTC* v. *Browning*, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970) (same).

In *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646 (5th Cir. 1977), the court held that although Atlantic Richfield had complied with an order enforcing an FTC subpoena *duces tecum*, the compliance "has not entirely mooted this appeal, because Atlantic may still be afforded *some relief* by an order to require *return of the subpoenaed documents*. . . ." *Id.* at 650 (emphasis added).[9/] Of particular interest here, the court

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9/ As an alternative ground for its finding that the appeal was not moot, the court found that the compliance had not been certified as complete and the court could order the documents segregated from other FTC staff. 546 F.2d at 650. Nevertheless, the court explicitly held that the ability to order the

explicitly construed the subpoena enforcement provisions of the FTC Act, *see* 15 U.S.C. § 49, *in pari materia* with the summons enforcement provisions of the IRS Code. 546 F.2d at 649-50 & n.4; *see also Anheuser-Busch, Inc.* v. *FTC*, 359 F.2d 487, 489-90 (8th Cir. 1966) (Blackmun, J.). Thus, the court in *Atlantic Richfield* applied *Reisman* v. *Caplin*, 375 U.S. 440 (1964) -- which held that, because 26 U.S.C. § 7402 provides a party an adequate remedy at law to contest an IRS summons in an enforcement proceeding, a party could not institute a separate action to enjoin enforcement of an IRS summons -- to deny relief in an action brought to enjoin an FTC subpoena *duces tecum*. 546 F.2d at 648-50. Particularly given that IRS summons enforcement and FTC subpoena enforcement provisions are to be interpreted *in pari materia*, there is, the Church submits, no principled basis upon which to distinguish compliance with an order enforcing an FTC subpoena *duces tecum* from compliance with an order enforcing an IRS summons for purposes of a determination of mootness.

In addition to summons or subpoena enforcement proceedings, it has long been basic doctrine that courts have the power to order such equitable relief. *See, e.g., Linn* v. *Chivatero*, 714 F.2d 1278, 1283 (5th Cir. 1983) (finding jurisdiction to decide taxpayer's Fourth Amendment claims resulting from inadvertent disclosure of personal records in response to an IRS summons: "in the absence of a pending criminal proceeding, the possiblity of eventual suppression affords little solace"); *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F.2d 15, 16-17 (7th Cir. 1978) (finding jurisdiction to order the return of property seized by the government despite the absence of any

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documents returned was a sufficient ground to prevent the appeal from being moot. *Id.*

criminal proceeding because "[c]ourts . . . have additionaily recognized an independent cause of action for return of property based on the general equitable jurisdiction of the federal courts"); *cf. Morrow* v. *District of Columbia*, 417 F.2d 737-39 (D.C. Cir. 1969) (upholding an order issued by the Court of General Sessions, which prohibited dissemination of an arrest record after dismissal of criminal charges, on the basis of ancillary jurisdiction, which *all* courts possess in aid of their original jurisdiction, absent explicit statutory denial of such power).

III. DISINTERESTED THIRD PARTY COMPLIANCE WITH AN IRS SUMMONS ENFORCEMENT ORDER DOES NOT RENDER AN APPEAL MOOT

With the exception of *Gluck*, 771 F.2d at 754 n.3, the cases cited in Point II do not discuss a possible distinction between compliance by interested or disinterested parties for purposes of mootness analysis. The FTC cases in particular correctly recognize that a party does not necessarily surrender a legal interest in the outcome of proceedings in which effective relief may be granted merely because he obeys a lawful court order rather than face potentially serious punishment for contempt. Petitioner contends, however, that the instant matter, which involves disinterested party compliance,[10/] presents a particularly strong case for a finding that the Church's appeal is not moot. Thus, even if this Court were to con-

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10/ The IRS summons in this case was directed against an indisputably disinterested third party -- the Los Angeles County Clerk. The County Clerk's disinterest in this proceeding is demonstrated by his failure to appear or to challenge the summons in any of the proceedings over the last seven years in this Court, in the court below, or on remand to the district court.

clude that when the taxpayer himself complies with a summons enforcement order rather than risking contempt, he has effectively forfeited his interest in the outcome, the same obviously cannot be said of a taxpayer's appeal following compliance by a disinterested party. Finally, petitioner emphasizes that it is not arguing for an *exception* to mootness principles when compliance is by a disinterested party, but rather that such a case is *not* moot when traditional mootness principles are applied properly.

Although most courts have simply ignored the issues raised by disinterested third party compliance, *see* Point IV, *infra*, the few courts that have addressed the issue have recognized a distinction between interested and disinterested party compliance for purposes of mootness analysis. In *Gluck*, *supra*, the Third Circuit noted that its position that a post-compliance appeal is not moot "perpetuates the conflict between this court and most other courts of appeals. . . ." 771 F.2d at 754 n.3. The court recognized, however:

> It appears that some of these courts would nevertheless hold that this case is not moot given that compliance with the summons was carried out by someone other than the appellant, i.e., the bank. These courts distinguish between cases in which the summons is issued to the taxpayer/appellant and those in which it is issued to a third party where the taxpayer has intervened. They reason that it is unreasonable to expect *a disinterested third party* to resist a summons and risk contempt of court in order to keep a controversy live; thus they hold that *compliance by the third party does not moot the appeal*.

Id. (emphasis added) (citing *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982)).

In *Arthur Andersen*, for example, the summoned third party, a large accounting firm, had a strong financial incentive to resist the summons.[11/] The First Circuit held that in such circumstances, the *interested* third party must refuse disclosure and risk a contempt citation to preserve for appeal the issue of the validity of the underlying enforcement order. 623 F.2d at 724. Because Arthur Andersen had complied with the summons, the court held that the appeal was moot. The court, however, explicitly distinguished this situation from that of a *disinterested* third party: "It would be unreasonable to expect individuals with no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply" in order to preserve the issues for appeal. *Id.* at 723-24.

Similarly, in *Kis*, the court held that *taxpayer* compliance with an IRS summons moots the taxpayer's appeal. 658 F.2d at 534. The court, however, explicitly distinguished that case from *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1978), in which an appeal of a denial of a motion to quash grand jury subpoenas *duces tecum* was held not moot because compliance had been by *disinterested* parties. *Kis*, 658 F.2d at 534. In distin-

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11/ The First Circuit stated that, "although Andersen is not the immediate target of the IRS investigation, it has asserted strenuously that it is damaged by the disclosure of these work papers to the IRS. . . . This asserted interest provides sufficient incentive for Andersen to take all available steps to avoid disclosure," including being held in contempt. *Arthur Andersen*, 623 F.2d at 724.

guishing its prior decision, the court stated "the subpoenas were directed at members of the staff of appellant . . ., not to [appellant] himself. It would have been unreasonable to require those staff members, who had *no personal interest in resisting* the subpoenas, to expose themselves to contempt by refusing to comply." *Id.* (emphasis added).[12/]

In *United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), *cert. denied*, ___U.S.___, 111 S.Ct. 49 (1990), the IRS issued a summons to Kersting, who promoted tax shelters, in order to identify taxpayers participating in his investments. *Id.* at 1408-09. The taxpayers intervened in the proceedings. *Id.* at 1410. Kersting "zealous[ly]" contested the summons, *id.* at 1411 n.9, and was held in contempt for refusing to comply with the district court's enforcement order, *id.* at 1409-10. On appeal, the Ninth Ciruit was unable to determine if Kersting had ultimately complied with the summons enforcement order, but, in dictum, stated that "[i]f he has so complied, *his appeal* of that order is moot." *Id.* at 1410 (emphasis added).

12/ In *United States* v. *Porter*, 711 F.2d 1397 (7th Cir. 1983), the court rejected the taxpayer's claim that he should be permitted to pursue an appeal following his attorney's compliance with a summons enforcement order on the ground that the attorney could not be expected to risk contempt in order to obtain review of the district court's order. *Id.* at 1400. The court interpreted the taxpayer's claim as seeking "a special exception to the mootness doctrine," *id.*, pursuant to *Perlman* v. *United States*, 247 U.S. 7, 12-13 (1918), rather than a claim that the appeal was not moot because the taxpayer continued to be engaged in a live controversy with the government. The court also mistakenly viewed the matter as merely "a disclosure controversy," which ended with "the surrender of the documents sought," *id.*, rather than as an ongoing controversy over the government's present possession and use of the documents. *See Gluck*, 771 F.2d at 753-54.

The court also found that compliance by Kersting would moot the intervening taxpayers' appeal because Kersting was an *interested* third party with a clear and strong economic motive to resist the summons. *Id.* at 1411 & n.9 (citing *Arthur Andersen*, *supra*). As the Ninth Circuit noted, *Arthur Andersen* "holds that whereas it is unreasonable to expect a *disinterested* third party to resist a summons at the risk of being held in contempt in order to protect the interests of those taxpayers whom the records concern, no such conclusion applies to interested third parties." *Kersting*, 891 F.2d at 1411 n.9 (emphasis original). Inexplicably, in dismissing the instant appeal as moot, the court below cited to *Kersting* without any discussion or analysis of *Kersting*'s explicit recognition that *disinterested* party compliance should not render an interested intervenor's appeal moot (Pet. App. 2a).

In *Baldridge* v. *United States*, 406 F.2d 526 (5th Cir. 1969), the majority relied upon two prior Fifth Circuit decisions involving taxpayer compliance to find an appeal moot after disinterested third party compliance with a summons enforcement order. Chief Judge Bailey Aldrich of the First Circuit, sitting by designation, however, wrote separately:

> If I had to cast the deciding vote I might find it somewhat difficult to accept that if the government seeks court relief to take from A certain property which A asserts is the property of B. . . . review of the court's order is mooted and all rights of appeal are lost if A, denied a stay pending appeal, chooses to surrender the property as against electing to spend up to a year in jail. A bailee has an obligation to protect property, but not to that extent.

Id. at 527 (Aldrich, C.J., dubitante).

Here, of course, the Church has had absolutely no control over the County Clerk's copies of its tapes or his decision to comply with the summons rather than risk contempt. As *Kersting*, *Arthur Andersen*, *Kis*, and *Gluck* have recognized, it is patently unfair and unreasonable to hold that an otherwise live and concrete controversy between the parties is mooted by the actions of a disinterested party with no stake in the outcome. These concerns of reasonableness and fairness have special force here where the documents at issue were wrongfully obtained by Mr. Armstrong in the first instance.[13/] Because the Church, after extensive, but ultimately unsuccessful, efforts to obtain a stay in the district court, the court of appeals, and this Court (and after its motion to expedite the appeal was granted), was unable to prevent the County Clerk's compliance with the summons enforcement order prior to appellate review, the Church's appeal should not have been dismissed as moot. There is no logic to a rule of mootness and, hence, a taxpayer's right of appeal, that turns on the fortuity of the location of the summoned material.

Petitioner emphasizes, however, that it does not seek an exception to the Article III case or controversy requirement based on some equitable notion of

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13/ Unlike most third party cases, in which the summons is directed at banks, attorneys, or accountants to whom the taxpayer voluntarily provided documents and financial information that the IRS subsequently sought, neither the Church nor Mr. Hubbard placed the tapes in the summoned party's possession. The tapes would not have been in the Clerk's possession but for their improper conversion by Mr. Armstrong.

reasonableness and fairness.[14/] Rather, the distinction recognized in the cases between interested and disinterested third party compliance is consistent with fundamental principles of mootness doctrine. Thus, even if this Court were to conclude that when an interested party complies with an order enforcing a subpoena or a summons, he may thereby demonstrate a lack of "a concrete interest in the outcome of the litigation," *Stotts*, *supra*, 467 U.S. at 571; *see, e.g.*, *Kis*, 658 F.2d at 534, a court has no basis to conclude that an interested party no longer has a concrete adverse interest in the litigation's outcome merely because of compliance by a disinterested party, *cf. Sibron* v. *New York*, 392 U.S. 40, 57 (1968) (holding appeal not moot where there has been no "suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation").

The summons enforcement cases discussed, *supra*, are consistent with this Court's decisions, which have long interpreted jurisdictional requirements with an eye to preserving the rights of interested parties when the government seeks documents from disinterested third parties. In *Perlman* v. *United States*, 247 U.S. 7 (1918), for example, the Court held that the jurisdictional finality rule for appeals did not bar the interested party -- who otherwise would be "powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way," *id.* at 13 -- from immediately appealing an order directing a court clerk to release to the govern-

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14/ *But see Honig* v. *Doe*, 484 U.S. 305, 329-32 (1988) (Rehnquist, C.J., concurring) (questioning prevailing view that mootness doctrine is rooted in Article III case or controversy requirement, and arguing that this Court has power to create exceptions to mootness doctrine "where there are strong reasons to" do so).

ment certain documents held under seal. *Id.* at 10-11.[15/] "The Court [in *Perlman*] held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege." *United States* v. *Nixon*, 418 U.S. 683, 691 (1974); *see United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *see also In re Grand Jury Subpoena*, 926 F.2d 1423, 1430 n.4 (5th Cir. 1991); *Doe*, *supra*, 825 F.2d at 236-37 (had Doe been a "third-party attorney who cannot be expected to risk a contempt citation," then the "target of the subpoena" could appeal the denial of the motion to quash); *Kis*, *supra*, 658 F.2d at 534; *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 201-02 (5th Cir. 1981) (citing cases). As these cases demonstrate, this Court has not construed jurisdictional requirements inflexibly to deny interested parties an appellate forum to review enforcement orders directed at disinterested parties. The same considerations should be applied here to permit the Church to pursue its appeal of the district court's erroneous enforcement order.

Finally, in 1976, Congress expressly provided a taxpayer with the right to notice and to intervene to prevent disinterested third party compliance with an IRS summons prior to judicial resolution. *See* 26 U.S.C. § 7609(a), (b)(1). This amendment modified *Donaldson* v. *United States*, 400 U.S. 517 (1971), in which this Court held that a taxpayer had only a permissive right of intervention in a summons enforcement proceeding directed against a third party. *Id.* at 528-30. Section 7609 reflected congressional concern that "the use of [third party summonses] should not

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15/ It appears from the Court's opinion that the government may have obtained the documents prior to the Court's review of the merits of the appeal. *Perlman*, 247 U.S. at 11.

unreasonably infringe on the civil rights of taxpayers, including the right to privacy. . . [current IRS policies] do not fully provide all of the safeguards which might be desirable in terms of protecting the right to privacy." H.R. Rep. No. 94-658, 94th Cong. 2d Sess. 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2897, 3203. "While the third-party witness also has this right of challenge . . . the interest of the third party witness in protecting the privacy of the records in question is frequently far less intense than that of the person to whom the records pertain." *Id*; *see* S. Rep. No. 94-938, 94th Cong., 2d Sess. 368, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3797; *United States* v. *New York Tel. Co.*, 644 F.2d 953, 956 (2d Cir. 1981).

Nothing in section 7609 evinces a congressional intent to limit judicial review of the propriety of the summons solely to the district court, whether that court's order is erroneous or not. *See* 26 U.S.C. § 7609(h)(l); *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). The consistent practice of the district courts, the courts of appeals, and this Court, however, has been to deny a stay following an order enforcing a summons directed at a disinterested third party, as occurred here. The effect of such denials, when coupled with holding the taxpayer's appeal moot following disinterested party compliance, not only is to deny consideration of a potentially meritorious appeal, but to undermine the rationale of *Perlman* and render the procedural protections created by Congress in 26 U.S.C. § 7609 a nullity for any taxpayer who does not prevail initially in the district court, no matter how erroneous the district court's order.

The Church further emphasizes that permitting its appeal to go forward will not interfere with the IRS' tax collection functions. The IRS has had the tapes for almost one year (and the transcript for over seven years) and may use them to pursue its alleged

civil fraud investigation unless and until a court orders otherwise. If an appellate court finds the district court order erroneous, certainly there is no injustice in requiring that the IRS return the tapes and make no further use of them. By contrast, both taxpayer intervention, authorized by Congress in 26 U.S.C. § 7609(b), and the ability of a taxpayer to preserve his right to appeal by refusing to comply with an enforcement order directed at him and risking contempt, may substantially delay IRS access to summoned documents and have a far greater impact on the IRS' pursuit of tax revenues than consideration of an interested party's appeal following disinterested party compliance with an erroneous summons enforcement order.

IV. PREVIOUS DECISIONS OF THE COURTS OF APPEALS FAIL TO ESTABLISH THAT COMPLIANCE BY A DISINTERESTED THIRD PARTY MOOTS AN APPEAL

The government has essentially ignored the availability of effective relief through return of the tapes and no further use of them, and instead has primarily relied upon its contention that all courts of appeals to consider the issue, except the Third Circuit, have held that compliance with an order enforcing an IRS summons renders an appeal moot. Although the government is correct that many cases hold that compliance moots an appeal of a summons enforcement order, these decisions consistently lack any meaningful analysis of the relevant issues that would in fact determine whether an appeal is moot, particularly whether the courts could grant effectual relief to the taxpayer by ordering return of or prohibiting further use of the documents. Moreover, as discussed in Point III, *supra*, those few courts that have actually considered the issue of disinterested party compliance have indicated that such compliance should not render an appeal by the interested party moot.

Petitioner is aware of 28 reported cases in nine courts of appeals[16/] -- ten were decided by the Fifth Circuit, five by the Eighth Circuit -- that have held post-compliance appeals of IRS summons enforcement orders moot. Ten of these appeals have involved compliance by the taxpayer or other clearly interested party. Eighteen of these appeals have involved compliance by a clearly or possibly disinterested third party.[17/] Most of these cases contain little or no analysis and merely cite to earlier cases, often from other circuits, that themselves contain little or no analysis. The supposed overwhelming weight of authority upon which the government relies is, upon analysis, nothing more than a house of cards built upon an extremely shaky foundation.

The fundamental flaw of those few decisions that actually contain any analysis is that they focus on a past event -- disclosure of the documents -- or a future event -- admission of the documents in a speculative future proceeding brought by the government -- (or both) and ignore a crucial issue for the taxpayer -- *present retention or use* of the summoned records by the IRS for investigative purposes, for which, as the Third Circuit recognized, effective relief may be granted. *See Gluck*, *supra*; *Waltman*, *supra*.

Thus, some courts have stated that once the documents have been disclosed, the court can do

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16/ Apparently, the District of Columbia and Eleventh Circuits have not issued any reported decisions on this question.

17/ Because, like the decision below (1a-2a), several of the cases contain virtually no factual description or legal analysis, it is sometimes impossible to tell whether the complying third party is interested or disinterested in the outcome. *See, e.g., United States v. Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981) (citing two cases, one which involved a disinterested party and one which involved an interested party).

nothing further. *See, e.g., United States* v. *Barrett*, 837 F.2d 1341, 1346 (5th Cir. 1988) ("a successful challenge to the enforcement order could afford no relief; the information has already been provided and thus the court would be powerless to provide relief that would affect the rights of the litigants"), *cert. denied*, 492 U.S. 926 (1989); *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989); *Porter*, *supra*, 711 F.2d at 1400. Other courts assert that because the taxpayer may bring a motion to suppress should the IRS seek to admit the records in some hypothetical future proceeding that may not occur, any decision on the propriety of the district court's enforcement order would be "an advisory opinion." *Lawhon* v. *United States*, 390 F.2d 663 (5th Cir. 1968); *see, e.g., United States* v. *Trails End Motel, Inc.*, 657 F.2d 1169, 1170 (10th Cir. 1981); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971). These courts simply fail to address the issue that is the taxpayer's obvious concern in pursuing his appeal following compliance -- immediate "prohibition of the use of the summoned documents . . . to afford [the taxpayer] effective relief." *Gluck*, 771 F.2d at 754. Because the cases generally fail to address this critical issue they provide no support for the government's position.

The seminal, and frequently cited, case on the issue of mootness following compliance with a summons enforcement order is the Fifth Circuit's decision in *Lawhon*, *supra*, in which the summons was issued to the taxpayer. The taxpayer not only produced the records, but they *"have subsequently been returned . . . ."* *Id.* at 663 (emphasis added). The court dismissed the appeal as moot, stating, without citation or further analysis:

> This motion, in effect, seeks to have this court give an advisory opinion as to the admissibility in evidence of the records or

> their product in the event of a subsequent criminal trial. Such event may not occur. This court passes no judgment on the question whether, if the mooted records are used in a subsequent prosecution of the taxpayers, if there be one, their introduction would be forbidden as violating the constitutional rights of the defendants.

Id. The court did not address present IRS use of the records, and had no need to do so because they had been returned. None of the numerous cases that cite to *Lawhon* make any reference to that fact.

In *Grathwohl* v. *United States*, 401 F.2d 166 (5th Cir. 1968), the court, without further analysis, relied on *Lawhon* to hold an appeal moot following compliance by a corporate officer with a summons enforcement order directed against the corporation. In *Baldridge*, *supra*, the majority, again without further analysis, relied upon *Lawhon* and *Grathwohl* to find an appeal moot after *disinterested* third party compliance with a summons enforcement order. As discussed in Point III, *supra*, one judge, however, wrote separately to express his doubts about holding a taxpayer's appeal moot because a disinterested party chose to comply with a court order rather than be held in contempt. 406 F.2d at 527 (Aldrich, C.J., dubitante).

Several other Fifth Circuit decisions, which held post-compliance appeals moot following disinterested party compliance, have cited to these or subsequent Fifth Circuit decisions, with no further analysis and no discussion of the doubts raised by Judge Aldrich in *Baldridge*. *See United States* v. *Carpenter*, 425 F.2d 264 (5th Cir. 1970); *United States* v. *Hankins*, 565 F.2d 1344 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States* v. *First Bank of Clute*, 626 F.2d 1227 (5th Cir. 1980), *cert. denied*, 452 U.S. 908 (1981);

United States v. *First American Bank*, 649 F.2d 288 (5th Cir. 1981); *United States* v. *Sweet*, 655 F.2d 54 (5th Cir. 1981).

In *United States* v. *Sherlock*, 756 F.2d 1145 (5th Cir. 1985), involving taxpayer compliance, the court reiterated *Lawhon's* rationale that the taxpayer may challenge an attempt to admit the records in a hypothetical future proceeding brought by the IRS. *Id.* at 1146-47. Of particular interest here, the opinion noted the Fifth Circuit's prior decision in *FTC* v. *Gibson Products*, *supra*, 569 F.2d 900, which had held that "compliance with summons did not moot appeal when further relief was available from appellate court through order to return subpoenaed documents and to forbid use of documents in ongoing adjudication." *Sherlock*, 756 F.2d at 1147 n.1. Nevertheless, in *Sherlock*, the court made no attempt to explain why the relief available to Gibson through return of documents and prohibition of use of the documents was not available to the taxpayer, nor did it otherwise attempt to reconcile its decision with *Gibson Products*.[18/]

In *Barrett*, *supra*, also involving taxpayer compliance, the Fifth Circuit, sitting *en banc*, reviewed the previous decisions of that court, 837 F.2d at 1345-46, and concluded, "Although none of the above authority provide much analysis, apparently the common denominator is that once *an individual* complies with a summons enforcement order, *that person* is precluded from appealing any issues that attack the validity of the . . . decision to enforce the summons." *Id.* at 1346 (emphasis added). Although *Barrett* noted that

18/ In *Gibson Products*, the court claimed to distinguish *Baldridge* on the unexplained ground that "it was not clear in *Baldridge* that further relief was available." 569 F.2d at 903 n.5.

"Sherlock's argument that the government continued to benefit from the material did not persuade the court otherwise[,] 756 F.2d at 1146," *Barrett*, 837 F.2d at 1345, neither *Barrett* nor *Sherlock* otherwise addressed this issue.

In *Lyons*, *supra*, 442 F.2d 1144, after a summons was issued to a third party accountant, the taxpayer obtained the summoned documents from the accountant. The district court then enforced the summons and the taxpayer returned the documents to the accountant, who complied with the summons. *Id.* at 1145. The First Circuit held the appeal moot on the ground that the taxpayer could seek to prevent use of the documents "[i]f and when a future criminal proceeding is initiated against taxpayer." *Id.* The court also stated that "appellate consideration of the propriety of the summons" was not justified at "this purely investigative stage," *id.*, but it made no attempt to explain why the district court has the authority to quash a summons at the investigatory stage, *see* 26 U.S.C. §§ 7402, 7604, yet it would be improper for an appellate court to exercise such power.

Numerous cases in six other circuits involving disinterested parties have flowed directly from the unexamined conclusions of *Lyons* and the early Fifth Circuit cases such as *Lawhon*, with no independent analysis and no discussion of any distinctions between taxpayer and disinterested party compliance.[19/] *See*, *e.g.*, *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *Hintze* v. IRS, 879 F.2d 121, 124-25 (4th Cir. 1989); *United States* v. *Patmon*,

19/ The four summons enforcement cases that hold a post-compliance appeal moot, but which do consider the distinction between disinterested and interested party compliance, are discussed in Point III, *supra*.

630 F.2d 458, 459 (6th Cir. 1980); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1277 (7th Cir. 1984); *Barney* v. *United States*, 568 F.2d 116, 117 (8th Cir. 1978); *United States* v. *First National Bank of Sturgis*, 587 F.2d 909, 910 (8th Cir. 1978); *United States* v. *Olson*, 604 F.2d 29, 31 (8th Cir. 1979); *United States* v. *Equity Farmers Elevator*, 652 F.2d 752 (8th Cir. 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981).

The Tenth Circuit has decided two cases involving interested party compliance, one which involved virtually no analysis. *See Trails End Motel, Inc., supra*, 657 F.2d at 1170-71. In *United States* v. *Church of World Peace*, 878 F.2d 1281 (10th Cir. 1989), the court, after a lengthy string cite, rejected the taxpayers' assertion that their claim for return of all copies of the documents and their expungement from IRS files prevented the case from being moot, although the *only* case the court cited that discussed this issue was *Gluck*, *supra*, which the court acknowledged had explicitly held to the contrary. *Id.* at 1284.

Finally, *United States* v. *Orlowski*, 808 F.2d 1283 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987), is of particular interest. The court therein stated, "This circuit, as well as every other circuit that has considered the question, has determined that compliance with an IRS summons moots a taxpayer's appeal of summons enforcement orders." *Id.* at 1287. The court then distinguished *Gluck* on the purported ground that "another issue was involved in the case, namely, whether the IRS could use the information it obtained under the summonses." *Id.* at 1287 n.6. The court in *Gluck*, however, correctly focused on the issue not just in *that* case, but in virtually *every* post-compliance taxpayer appeal. If the taxpayer has no objection to the IRS' *use* of the summoned information, then why would he pursue an appeal rather than await an

attempt by the IRS to admit the evidence in some future prosecution?

Although a minority view, *Gluck* is clearly correct that a controversy remains between the *interested* party and the IRS concerning "use of the summoned documents," 771 F.2d at 754, and effective relief remains available after the IRS obtains the summoned documents from a disinterested party and before it seeks to admit them against the taxpayer in a future proceeding. *Id.* The unspoken -- and incorrect -- assumption of the cases that hold a post-compliance appeal moot is that if the IRS ultimately does not commence criminal or civil tax proceedings, then no harm to the taxpayer is done. A necessary corollary to this assumption is that the taxpayer has no interest in prohibiting continued government possession of his private, proprietary records, and that he suffers no harm when the IRS has improper or unlawful access to these papers; when it discloses them to other officials; when it uses those papers to conduct a potentially intrusive and embarrassing investigation of a taxpayer; and when it brings a criminal or civil tax proceeding dependent on improperly obtained documents.

In *Sells*, this Court rejected similar arguments, and made clear that the government's continuing access to, use, and disclosure of wrongfully obtained documents was itself a serious ongoing harm that constituted a live controversy over which the federal courts retained jurisdiction to fashion an appropriate remedy. 463 U.S. at 422 n.6. As the court of appeals stated in *Sells*, "This action is a proper means to prevent future disclosure before it occurs; the availability of a motion to suppress in future civil proceedings" does not foreclose the court's immediate consideration of the issues. 642 F.2d at 1188; *see also Gluck*, 771 F.2d at 753-54; *Doe*, *supra*, 825 F.2d at 235.

Congress also has rejected the view that a taxpayer suffers no harm when the IRS obtains documents from an interested third party. By enacting section 7609 to permit a taxpayer to challenge an IRS summons issued to a disinterested party, Congress recognized that the taxpayer may suffer substantial harm when the IRS improperly or unlawfully obtains and uses the citizen's private papers. *See* H.R. Rep. No. 94-658, *supra*, at 307 ("use of [third party summons] should not unreasonably infringe on the civil rights of taxpayers, including the right to privacy"); S. Rep. No. 94-938, *supra*, at 368.

Petitioner retains a privacy interest in the tapes sufficient to warrant their return and an order prohibiting the IRS from further use or dissemination, should the district court's enforcement order be found erroneous. *See, e.g., United States* v. *Hubbard*, 650 F.2d 293 (D.C. Cir. 1980). In *Hubbard*, the court found ancillary jurisdiction to hear the Church's motion to reseal records based on a combination of privacy and property interests. As the court noted, "Congress has recognized that the dissemination of information compounds whatever infringement of privacy occurs when materials or information are obtained through compulsory means". *Id.* at 305. The court also held that the Church's privacy interest in its documents survived an eight-month period during which the documents were available for public inspection pursuant to an improper district court unsealing order: "Because we conceive of the interests asserted as a continuum which can be further invaded with each passing day by a single and unchanging encroachment, we do not think the case has become moot." *Id.* at 319 n.99; *see also Cell Associates, Inc.* v. *National Institutes of Health*, 579 F.2d 1155, 1157 (9th Cir. 1978).

Petitioner also has a proprietary right in the copies of the tapes that has not been diminished or extinguished by the IRS' possession. *See, e.g., Sovereign News Co.* v. *United States*, 690 F.2d 569, 577 (6th Cir. 1982) (holding that *copies* of Sovereign News' business records in the government's possession were the "sole property" of Sovereign News; "when the government has held the copies for a 'reasonable time' and has no investigations in progress, it must return the copies as well as the originals"), *cert. denied*, 464 U.S. 814 (1983).

Indeed, under the government's "logic", there would never be a reason to permit a taxpayer challenge to a third-party summons. The IRS would issue the summons and the disinterested party would be required to produce the documents. Any challenge would have to await some future proceeding in which the IRS sought to admit the documents against the taxpayer. Certainly, a district court order -- whether or not erroneous -- enforcing a summons issued to a disinterested party is no more "advisory" or "speculative" on the admissibility of those records in some future proceeding than an appellate court ruling on this issue. The possible availability of a future proceeding in which the taxpayer may make a suppression motion, however, is simply irrelevant to the present mootness inquiry, which concerns the IRS' *present* right to use and to possess the documents.

Thus, the courts that have rejected the Third Circuit's reasoning are simply incorrect that resolution of the substantive questions raised by the Church on appeal would constitute "'an advisory opinion as to the admissibility in evidence of the records or their product in the event of a subsequent criminal trial.'" *Barrett*, 837 F.2d at 1346 (quoting *Lawhon*, 390 F.2d at 663). Rather, the appellate court would be resolving a definite and concrete live controversy between

adverse parties, which, if resolved in favor of the Church, could be remedied through return of the tapes and a prohibition on any future disclosures or use of the information obtained. *See Sells*, 463 U.S. at 422 n.6; *Gluck*, 771 F.2d at 753-54. Congress, in enacting 26 U.S.C. § 7609, intended to provide taxpayers with the ability to prevent erroneous IRS access to documents held by disinterested third parties. It belies logic and common sense to conclude that Congress' concerns dissipate at the moment of disinterested party compliance with an *erroneous* district court order, so as to deprive the taxpayer of his right to appeal and to obtain effective relief.

CONCLUSION

For the reasons stated herein, the judgment of the court of appeals should be reversed, and the matter should be remanded for resolution of the issues raised by the Church in its appeal.

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Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
HILLARY RICHARD
RABINOWITZ, BOUDIN,
STANDARD, KRINSKY
& LIEBERMAN, P.C.
740 Broadway - 5th Floor
New York, NY 10003
(212) 254-1111

MICHAEL LEE HERTZBERG
740 Broadway - 5th Floor
New York, NY 10003
(212) 982-9870

Counsel for Petitioner
Church of Scientology
of California